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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Federal-State Joint Board on
Universal Service

CC Docket No. 96-45

To: The Commission

**REPLY TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION**

ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby replies to oppositions (and comments) to its previously-filed Petition For Reconsideration ("Petition") of the Report and Order (the "Order")^{1/} in the above-captioned proceeding. In support of this reply, ProNet respectfully shows the following:

ProNet's Petition established that the Order:

- ▶ unfairly distorts competition between paging and rival, two-way CMRS services (e.g., cellular, broadband PCS, interconnected SMR) because the latter will be eligible for universal service support, while paging will not; to recover its universal service costs, paging service prices will rise disproportionately relative to competing CMRS prices; as a result, consumers will substitute two-way CMRS for paging solely because of the Order;
- ▶ fails to demonstrate how universal service-- i.e., subsidizing basic telecommunications services to residential users in low income, rural and high cost areas-- confers any benefit whatsoever on paging carriers; thus, there is no support for the Order's claim (at ¶805) that paging carriers benefit from a ubiquitous telephone network;

^{1/} The Order was released May 8, 1997, and was published in the Federal Register on June 17, 1997.

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- ▶ interprets Section 254 of the Communications Act to extend the permissible use of universal service contributions to promoting general education-- a "general welfare" objective that is not reasonably related to telecommunications regulation; the universal service contributions required by the Order thus constitute a tax, which (having originated in the Senate rather than the House of Representatives) violates Article I, Section 7 of the Constitution; and
- ▶ confounds the plain meaning of Section 332(c)(3) of the Communications Act by arbitrarily nullifying that provision's express limitation that states may compel universal service fund contributions from providers of commercial mobile service only where such "services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State."

Although these positions were convincingly supported by multiple commenting parties,^{2/} several dissenting views were also heard. In each case, however, the contrary arguments rely on invalid or oversimplified assumptions, and should therefore be rejected. Each of these arguments is addressed below.

I. The Order Effectively Discriminates Against Paging Carriers Vis-A-Vis Two-Way CMRS

A handful of parties incorrectly claim that paging carriers are seeking preferential treatment in the form of exemptions or discounted contribution requirements. As shown in ProNet's Petition (at 4-6), however, the paging industry is not seeking an advantage, but rather relief from patently from assessments that, as applied, are clearly discriminatory.

^{2/} See Comments of 360° Communications Company (at 1-2); Comments of Personal Communications Industry Association ("PCIA") on Petitions For Reconsideration (at 3-10; 10-13); Opposition to Petitions For Reconsideration of the Cellular Telecommunications Industry Association ("CTIA") (at 7-13); Joint Opposition to Petitions For Reconsideration of Comcast Cellular Communications, Inc. and Vanguard Cellular Systems, Inc ("Comcast/Vanguard") (at 4-5); Comments on Petitions for Reconsideration of GTE Service Corporation (at 18-21); and Response to Petitions For Reconsideration of the American Mobile Telecommunications Association, Inc. (at 5-6).

Bell Atlantic argues that because paging competes with two-way CMRS, the former must contribute to the universal service fund to the same extent as the latter.^{3/} Similarly, the Rural Telecommunications Coalition ("RTC") asserts that "[t]he Commission's rules are fair in that the same measure is used to assess the contributions of all contributors," and that paging carriers should not be afforded favorable treatment.^{4/} Likewise, MCI Telecommunications, Inc. ("MCI") states that equity and the text of Section 254 require paging carriers to contribute to the universal service fund.^{5/} As is clear from ProNet's Petition, however, the contribution and support provisions of the Order, considered on a *net* basis, disproportionately affect paging; therefore, the Order fails the mandate of competitive neutrality in Section 254(d) of the Act.

Specifically, Bell Atlantic, RTC and MCI conveniently ignore the fact that two-way CMRS carriers will be able to recoup at least a portion of their contributions through universal service support, whereas paging carriers are categorically excluded from such benefits.^{6/} As a result, paging carriers-- but not their two-way CMRS competitors-- will incur absolute costs and, to recoup these costs, paging carriers will be compelled to raise subscriber prices by a higher percentage than two-way CMRS carriers. Moreover, as ProNet has explained (Petition at 5), due to intense price competition in paging, these costs will constitute a greater percentage of paging carriers' profit margins. These factors make it likely that incongruent universal service contribution requirements will, *in and of themselves*, cause paging subscribers to migrate to two-way mobile services, thereby

^{3/} Opposition of Bell Atlantic to Petitions for Reconsideration, at 8-9.

^{4/} Opposition to Petitions of RTC, at 7.

^{5/} Opposition of MCI, at 17.

^{6/} ProNet Petition, at 4.

contravening the Commission's stated objective of avoiding uneconomic substitution.^{7/}

Accordingly, as applied to paging on a net basis, the Order's contribution requirements are *de facto* discriminatory. Far from ensuring competitive neutrality, the Commission's refusal to consider mitigation, in the form of discounted contribution levels for paging, will have a potentially draconian effect on paging carriers. Bell Atlantic, RTC and MCI ignore the real-world discriminatory effects discussed in ProNet's Petition and herein; their opposing arguments based on vague generalities are therefore entirely unpersuasive.

II. There Is No Nexus Between Universal Service And Any Benefits Derived By Paging Carriers From A Ubiquitous Network

RTC also opposes reduced universal service contributions from paging carriers because, "paging services would not exist but for the public switched network utilized by their customers to receive and send calls."^{8/} This argument merely restates the Commission's assertion of a general benefit from ubiquity (Order, at ¶805) which, as ProNet has shown, is unrelated to, and unaffected by, universal service with respect to paging. Not only is paging excluded from the services to be supported by universal service funds, but provision of these services-- *i.e.*, basic telecommunications services to rural, low income and high cost areas; and access to advanced telecommunications services for schools, health care facilities and libraries-- will have minimal or no impact on demand for paging services, and will in no way enhance the theoretical benefits to paging of a ubiquitous

^{7/} Order, at ¶850.

^{8/} RTC, at 7.

public switched network.^{9/}

AT&T Corporation ("AT&T") offers an equally flawed claim that paging carriers are similarly situated as interexchange carriers ("IXCs") that do not receive direct universal service support but must nevertheless contribute to the fund.^{10/} AT&T's analogy readily breaks down, however, when one recognizes that IXCs realize an immense, albeit indirect, benefit from expansion of the local exchange subscriber universe. Residential users of local exchange service have immediate, direct access to the interexchange network. In other words, universal service funds that subsidize expansion of the local exchange network facilitate and, therefore, subsidize increased use of IXCs' services. By contrast, as shown above, paging carriers will be wholly unaffected (or only marginally affected) by the provision of universal services as set forth in the Order.

III. As Applied To Paging, The Commission's Universal Service Contribution Rules Are Unconstitutional

RTC (at 7-8) disagrees with ProNet's and other petitioners' labeling mandatory universal service fund contributions as an unlawful taking or tax. That the funds collected for universal service support will not be commingled with the "general revenue," however, is not the sole test for whether an assessment constitutes a tax. Rather, a tax "raises revenue to benefit the public interest whereas a fee bestows a benefit upon the payee which is not shared by other members of society."^{11/} Indeed, RTC admits that "non-tax" assessments must be designated for purposes directly related to regulation of the industry being assessed. Here, however:

^{9/} See ProNet's Petition, at 7-8.

^{10/} AT&T Opposition to Petitions for Reconsideration, at 21.

^{11/} Comcast/Vanguard, at 7.

- the subject statute, Section 254 of the Act, is directed towards the general “public interest” rather than narrowly tailored to regulate telecommunications;^{12/}
- the Commission has interpreted Section 254 of the Act to extend to general educational objectives-- it authorizes distribution of universal service funds to *non-carriers* for *non-telecommunications services* (i.e., inside wire, computers and software); and
- the primary beneficiaries of universal service will be rural and low-income consumers, schools, hospitals and libraries, with only minimal benefit inuring to select telecommunications carriers.

Thus, as established in the Order, the universal service fund goes beyond the legitimate purposes of a fee incident to regulation of the telecommunications industry. Consequently, the universal service fund must be characterized as a tax, and therefore is unconstitutional (having been introduced in the United States Senate).

Moreover, even if RTC was correct (which it is not) in its belief that the universal service fund is not a tax, such “user fees” must be reasonably related to the benefits conferred, *irrespective of whether or not the fees constitute an exercise of Congress’ taxing power.*^{13/} As ProNet showed in its Petition, the Order’s disproportionate burden on paging carriers, with no corresponding benefit, clearly fails this constitutional requirement.

IV. The Commission Must Modify Its Order To Ensure Compliance With Section 332(c) Of The Act

ProNet’s argument that the Order is inconsistent with Section 332(c)’s preemption of state regulation of CMRS entry and rates (Petition at 9-13) received substantial support from multiple

^{12/} See Comcast/Vanguard, at 7.

^{13/} See, e.g., *Massachusetts v. U.S.*, 435 U.S. 444, 463-467 (1978); *Colorado Springs Production Credit Association v. Farm Credit Administration*. 967 F.2d 648, 654 (D.C. Cir. 1992).

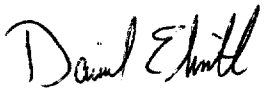
parties.^{14/} It is incumbent upon the Commission to reconsider this issue. In particular, ProNet agrees with CTIA (9-12), and GTE (at 19-20) that the Commission must prevent states from using universal service assessments to unlawfully regulate CMRS rates or entry.

V. Conclusion

WHEREFORE, the foregoing premises considered, the Commission's Order should be modified as set forth in ProNet's Petition.

Respectfully submitted,

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^{14/} See text at note 1, *supra*, particularly PCIA, at 3-10.

CERTIFICATE OF SERVICE

I, Maleesha Spriggs, a secretary in the law offices of Gurman, Blask & Freedman, Chartered, do hereby certify that I have on this 28th day of August, 1997 caused copies of the foregoing "REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION" to be sent first class mail, and postage prepaid to the following:

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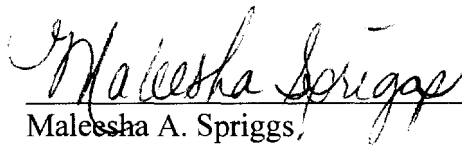
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